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No. 90-1420

In the Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA A. MCKINNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a criminal RICO prosecution in which the government seeks forfeiture from a fugitive defendant who transferred the forfeitable proceeds under 18 U.S.C. 1963(a) out of the country, a district court may issue a pretrial order restraining substitute assets of the defendant that he transferred to a non-RICO co-defendant in the United States.

2. Whether the pretrial restraint of the fugitive RICO defendant's substitute assets transferred to a non-RICO defendant violates the non-RICO defendant's Sixth Amendment right to counsel.

3. Whether the pretrial restraint of the fugitive RICO defendant's substitute assets violates due process.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	17
Barker v. *Wingo*, 407 U.S. 514 (1972)	16
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)	16
Caplin & Drysdal, Chartered v. *United States*, 491 U.S. 617 (1989)	14, 16
Gerstein v. *Pugh*, 420 U.S. 103 (1975)	15
Hoffman Estates v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)	18
United States v. *Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 849 (1989)	15
United States v. *Chinn*, 687 F. Supp. 125 (S.D.N.Y. 1988)	14
United States v. *$8,850*, 461 U.S. 555 (1983)	16
United States v. *Lovasco*, 431 U.S. 783 (1977)	17
United States v. *Mazurie*, 419 U.S. 544 (1975)	17
United States v. *Monsanto*, 491 U.S. 600 (1989)	10, 14
United States v. *Powell*, 423 U.S. 87 (1975)	17
United States v. *Regan*, 858 F.2d 115 (2d Cir. 1988)	13

Constitution and statutes: Page

U.S. Const.:
Amend. I 17
Amend. VI 7, 14, 15, 16
Due Process Clause 16
Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. XI, § 1153(a), 100 Stat. 3207-3213 10
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, 102 Stat. 4387:
§ 7034, 102 Stat. 4398 10
§ 7034(b), 102 Stat. 4398 13
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976:
§ 302, 98 Stat. 2040-2041 10
§ 2301(b), 98 Stat. 2192 10
Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 23, 100 Stat. 3597 10
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*:
18 U.S.C. 1962(c) 2
18 U.S.C. 1963 ..... 6, 7, 9, 10, 17
18 U.S.C. 1963(a) 8
18 U.S.C. 1963(a)(1) 2, 3, 8
18 U.S.C. 1963(a)(3) 2, 3, 8
18 U.S.C. 1963(c) 9, 12
18 U.S.C. 1963(d)(1)(A) 2, 4, 9, 13, 17
18 U.S.C. 1963(d)(2) 2
18 U.S.C. 1963(m) 8, 9, 11
18 U.S.C. 1963(m)(3) 8
18 U.S.C. 1963(m)(5) 13
18 U.S.C. 1963(n) 13
18 U.S.C. 371 2
18 U.S.C. 1341 2
18 U.S.C. 1343 2
21 U.S.C. 853(e)(1)(A) 10

Miscellaneous:

	Page
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) ...	10, 12, 15
United States Attorneys' Manual (blue sheet June 30, 1989)	12
Washington Post, Apr. 27, 1991	17

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 915 F.2d 916.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1990. A petition for rehearing was denied on November 9, 1990. Pet. App. 29a-30a. On January 24, 1991, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 9, 1991 (a Saturday), and the petition was filed on March 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 15, 1989, the United States District Court for the District of Maryland entered a temporary restraining order pursuant to 18 U.S.C. 1963(d)(2) restraining petitioners from spending funds transferred to them by Tom J. Billman, a fugitive. The temporary restraining order was continued in effect by consent of the parties until January 25, 1990, when petitioner McKinney challenged its validity. In the meantime, on December 1, 1989, a federal grand jury in the District of Maryland returned an indictment charging Billman with conspiring to commit mail fraud and wire fraud, in violation of 18 U.S.C. 371; with three substantive counts of mail fraud, in violation of 18 U.S.C. 1341; with 15 substantive counts of wire fraud, in violation of 18 U.S.C. 1343; and with participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c). Petitioner McKinney was charged in the indictment with conspiracy to commit mail and wire fraud, three counts of mail fraud, and ten counts of wire fraud. The indictment also sought forfeiture of $28 million against Billman and $14 million against co-defendant Crysopt Corporation as RICO proceeds pursuant to 18 U.S.C. 1963(a)(1) and (3). Following an evidentiary hearing, the district court declined to enter a post-indictment injunction against petitioners pursuant to 18 U.S.C. 1963(d)(1)(A), vacated the temporary restraining order, and dismissed the case. Pet. App. 14a-28a, 32a-33a. The court of appeals reversed and remanded for entry of an appropriate injunction. Pet. App. 1a-13a.

1. Billman and co-defendant Clayton C. McCuiston owned EPIC Holdings, Ltd., a holding company that controlled Community Savings and Loan in Bethesda,

Maryland. Petitioner McKinney was a vice-president and director of the holding company. The indictment charged that Billman, McCuiston, and McKinney used their positions at Community Savings and Loan and its holding company to defraud depositors by siphoning money away from its operations between April 1984 and February 1986. Part of the proceeds of the fraud were paid over to Billman and McCuiston through a holding company dividend of $14 million in January 1985. Shortly thereafter, Billman and McCuiston funded Crysopt Corporation with an additional $14 million in cash. Billman was the president, chairman of the board, and sole shareholder of Crysopt; McKinney was an officer and director of the company. Pet. App. 2a; Gov't C.A. Br. 4-5.

The indictment alleged that Billman, petitioner McKinney, and Crysopt began transferring proceeds of the fraudulent scheme to Swiss bank accounts in July 1985 for the purpose of concealing their ill-gotten gains. It specifically alleged that Billman, McKinney and Crysopt made two separate transfers of $4 million to such accounts in August 1985. The indictment further alleged that Billman transferred a total of more than $22 million in fraudulent proceeds to Swiss bank accounts. Pet. App. 2a; Gov't C.A. Br. 5.

Petitioner McKinney, Billman, McCuiston, and Crysopt Corporation were indicted for mail fraud, wire fraud, and conspiring to commit those offenses during their operation of Community Savings and Loan. Billman and Crysopt -- but not petitioner McKinney -- were separately charged with RICO violations arising from the same events. The indictment sought forfeiture of $28 million against Billman and $14 million against co-defendant Crysopt Corporation as RICO proceeds pursuant to 18 U.S.C. 1963(a)(1) and (3). Pet. App. 2a; Gov't C.A. Br. 2.

Before the indictment was returned, Billman fled the country. He remains a fugitive. Pet. App. 2a; Gov't C.A. Br. 5-6.[1]

2. The temporary restraining order, which was entered before the indictment was returned, prohibited petitioner McKinney and her parents, petitioners Robert and Roselyn Budjac, from spending funds transferred to them by Billman. The funds named in the order included the proceeds of a wire transfer of $499,935.89 from Billman to McKinney as well as other payments totaling $50,000 that had been made or were to be made to McKinney by William McKnew at Billman's direction. C.A. App. 5-7. When McKinney later challenged the validity of the temporary restraining order after the indictment was returned, the government moved for entry of an injunction pursuant to 18 U.S.C. 1963(d)(1)(A). Gov't C.A. Br. 2-3.

a. The evidence at the evidentiary hearing showed that Barclays Bank of London, England, transferred $499,935.89 to an account held by petitioner McKinney and her mother, petitioner Roselyn Budjac, at Comerica Bank in Detroit, Michigan, on May 17, 1989. Two days later, McKinney's mother withdrew $500,368.81 and closed the account. The money was subsequently deposited in other accounts and placed in certificates of deposit at Comerica Bank and another bank. McKinney also gave her parents $35,480. Pet. App. 2a-4a; Gov't C.A. Br. 7, 9-10.

At the evidentiary hearing, the government introduced tape-recorded telephone conversations demonstrating that

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[1] A state court placed Community Savings and Loan in receivership in 1985 when it was unable to return funds to its depositors. Billman disappeared in October 1988 after a civil jury awarded the Maryland Deposit Insurance Fund $112 million against Billman, McCuiston, and Crysopt and nearly $102 million against petitioner McKinney for the losses sustained by Community Savings and Loan. Gov't C.A. Br. 5-6.

Billman was the source of the $499,935.89 transferred to McKinney and her mother. Eight days before the transfer, McKinney received an overseas call from Michael Byrd, a London solicitor, who informed her that he and she had a "mutual client."[2] Byrd explained that he would transfer some money to her as soon as he received the funds. The day after the wire transfer, McKinney received a brief telephone call from Billman, who stated his understanding that "the eagle has flown and landed on your end. Is that correct?" Pet. App. 3a. McKinney responded that she had not heard, and she and Billman arranged in code to discuss the matter on a different telephone the following day. When Billman called McKinney the next day, he asked: "Did you get the money?" *Ibid.* After McKinney confirmed that she had received it, Billman apologized for taking so long to effect the wire transfer. During that conversation, McKinney and Billman spoke at length about the wire transfer, and they discussed how McKinney would use the money. Billman also asked "[i]s McKnew still paying you?" and McKinney acknowledged that he was. *Id.* at 4a. See *id.* at 2a-4a; Gov't C.A. Br. 6-10.

b. The proof at the evidentiary hearing also showed that William C. McKnew was making regular payments of $6,250 to McKinney to repay a debt that he owed to Billman. The debt arose out of a business transaction among Billman, McKnew, and Europlan Holdings, Ltd. After Billman introduced Michael Dee, a director of Europlan, to McKnew, Europlan invested $80,000 in the stock of McKnew's business with the option of reselling the shares to Billman in three years at Europlan's cost. Billman later repurchased Europlan's stock in McKnew's business, but he requested that the shares remain registered in Europlan's name.

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[2] During the investigation, Byrd told an agent from New Scotland Yard that Billman was his client. Pet. App. 2a-3a.

Billman subsequently sold the stock back to McKnew for $80,000, and he directed Dee to transfer the shares in exchange for McKnew's promissory note. In April 1989, however, Billman and McKnew renegotiated the terms of the sale to have McKnew make eight monthly payments of $6,250 to McKinney for a total payment of $50,000 for the stock. When Billman told Dee to substitute McKinney for him on the debt, Dee thought the transaction was very strange since Billman would lose a considerable amount of money. McKnew had made four payments to McKinney at the time the temporary restraining order was entered. Pet. App. 4a-5a; Gov't C.A. Br. 10-11.

3. The district court held that 18 U.S.C. 1963 does not authorize a pretrial injunction against a third party to restrain assets transferred from a RICO defendant unless the government proves that the transferred assets were proceeds of the RICO offense. It also ruled that 18 U.S.C. 1963 does not authorize a pretrial injunction restraining substitute assets of a RICO defendant transferred to a third party. The court found that the government had not proved that the funds transferred to petitioner McKinney were part of the proceeds of the RICO offense alleged in the indictment. It also found that the funds belonged to McKinney after they were transferred to her. The district court therefore declined to enter a pretrial injunction against petitioners, vacated the temporary restraining order, and dismissed the case. Pet. App. 14a-28a, 32a-33a.

4. The court of appeals unanimously reversed and remanded for entry of an appropriate injunction. Pet. App. 1a-13a.[3] It noted that "[t]here can be no doubt that Billman was the source of the funds sent to [petitioner] McKinney

[3] Petitioners' reproduction of the court of appeals' decision in their appendix does not identify the panel members. They were Justice Powell, sitting by designation, Senior Judge Butzner, and Judge Hall.

through his solicitor and through the Europlan transaction." *Id.* at 6a-7a.[4] The court accepted, however, the district court's factual findings and assumed that "the source of the funds was money that Billman did not steal from Community [Savings and Loan]." *Id.* at 7a. The court concluded that 18 U.S.C. 1963 nevertheless authorizes the pretrial restraint of substitute assets of a RICO defendant transferred to a third party when the RICO defendant places the racketeering proceeds from the RICO offense beyond the jurisdiction of the district court. Pet. App. 7a-10a. The court thus held that "the pretrial restraining provisions of [18 U.S.C. 1963] do not permit a defendant to thwart the operation of the forfeiture laws by absconding with RICO proceeds and then transferring his substitute assets to a third person who does not qualify as a bona fide purchaser for value." *Id.* at 11a.

The court of appeals rejected petitioner McKinney's claim that the pretrial restraint of the transferred funds violated her Sixth Amendment right to counsel by depriving her of funds to retain counsel of her choice. Pet. App. 11a-12a. The court also rejected petitioner's claim that the pretrial restraint of the transferred funds for an indefinite period of time denies her due process. *Id.* at 12a-13a.

ARGUMENT

1. Petitioners contend that 18 U.S.C. 1963 does not authorize a pretrial injunction restraining assets transferred to a third party unless the government proves that the assets are directly traceable to the racketeering proceeds of a RICO offense. Pet. 12-16. Because this issue is one of first

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[4] Petitioners therefore err in claiming that the government "could not establish that Billman had ever owned the funds or had transferred them to McKinney." Pet. 8. See also Pet. 16.

impression and because the court of appeals correctly resolved it, review by this Court is unwarranted.

a. The court of appeals correctly held that the substitute assets of a RICO defendant transferred to a third party are subject to forfeiture when the RICO defendant has placed the racketeering proceeds from the RICO offense beyond the jurisdiction of the district court. Pet. App. 7a-9a. Sections 1963(a)(1) and (3) provide that the racketeering proceeds of a RICO offense shall be forfeited to the United States.[5] If a RICO defendant places the forfeitable proceeds beyond the jurisdiction of the district court, Section 1963(m)(3) requires the court to order the forfeiture of any other property of the defendant up to the value of the removed property.[6] Since the indictment in this case alleges

[5] Section 1963(a) provides in part:

> Whoever violates any provision of section 1962 of this chapter • • • shall forfeit to the United States, irrespective of any provision of State law –
>
> (1) any interest the person has acquired or maintained in violation of section 1962;
>
> • • • • •
>
> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

[6] Section 1963(m) provides:

> If any of the property described in subsection (a), as a result of any act or omission of the defendant –
>
> (1) cannot be located upon the exercise of due diligence;
>
> (2) has been transferred or sold to, or deposited with, a third party;
>
> (3) has been placed beyond the jurisdiction of the court;
>
> (4) has been substantially diminished in value; or
>
> (5) has been commingled with other property which cannot be divided without difficulty;
>
> the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

that Billman has placed the racketeering proceeds beyond the juridiction of the district court, Section 1963(m) authorizes the forfeiture of his substitute assets. Moreover, Section 1963(c) provides that any forfeitable property transferred to a third party shall be forfeited unless the transferee establishes that he was a bona fide purchaser for value of the property. Consequently, the substitute assets that Billman transferred to petitioner McKinney are subject to forfeiture unless McKinney establishes that she qualifies as a bona fide purchaser for value.

Contrary to petitioners' contention, Pet. 12-15, the court of appeals' conclusion that forfeitable substitute assets of a RICO defendant are subject to pretrial restraint under Section 1963 is consistent with the text of the RICO Act. Section 1963(d)(1)(A) authorizes a district court to enter a restraining order or an injunction, to require the execution of a satisfactory performance bond, and to take any other action to preserve the availability of "property described in subsection (a)" that, in the event of a conviction, is subject to forfeiture.[7] Substitute assets become subject to forfeiture under subsection (m) when "the property described in subsection (a)" is no longer available for forfeiture.[8] For

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[7] Section 1963(d)(1)(A) provides:

> (d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--
>
> (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section[.]

[8] Petitioners mistakenly assert, Pet. 4-5, that the pretrial restraint provision of subsection (d)(1)(A) and the substitute asset provision of

that reason, the court of appeals properly concluded that "when, as here, the defendant has placed the assets specified in subsection (a) beyond the jurisdiction of the court, subsection (d)(1)(A) must be read in conjunction with subsection (m) to preserve the availability of substitute assets pending trial." Pet. App. 9a.

That interpretation of the RICO statute is a sensible one. In analyzing the reach of the analogous provision in 21 U.S.C. 853(e)(1)(A) in *United States* v. *Monsanto*, 491 U.S. 600, 613 (1989) (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 204 (1983)), this Court emphasized that "[t]he sole purpose of [the] restraining order provision * * * is to preserve the status quo, *i.e.*, to assure the availability of the property pending disposition of the criminal case." When a RICO defendant has already placed the forfeitable racketeering proceeds beyond the jurisdiction of the court, preventing pretrial restraint of substitute assets under subsection (m) would clearly defeat the remedial purpose of the statute: to preserve the availability of assets subject to forfeiture. Thus, the Fourth Circuit correctly determined that "§ 1963(d)(1)(A) should be construed to authorize the pretrial restraint of those assets specified by subsections (a) and (m) that can be forfeited after conviction." Pet. App. 10a.

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subsection (m) were enacted together in the Comprehensive Crime Control Act of 1984. Although a substitute asset provision similar to the current subsection (m) was included in the amendments to Section 1963 in the Comprehensive Crime Control Act of 1984, that provision was repealed in a later section of the same Act. See Pub. L. No. 98-473, Tit. II, §§ 302, 2301(b), 98 Stat. 2040-2041, 2192 (1984). Subsection (m) was enacted two years later as part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. XI, § 1153(a), 100 Stat. 3207-3213, as amended by Pub. L. No. 99-646, § 23, 100 Stat. 3597 (1986) and Pub. L. No. 100-690, Tit. VII, § 7034, 102 Stat. 4398 (1988).

The court of appeals' decision does not permit the pretrial restraint of a third party's assets without any showing that the assets once belonged to or were controlled by the RICO defendant, as petitioner contends. Pet. 15-16. By its terms, Section 1963(m) authorizes the forfeiture of "any other property of the defendant" when the racketeering proceeds are unavailable for forfeiture as a result of any act or omission of the defendant. To be sure, the district court found that the funds transferred to petitioner McKinney were not racketeering proceeds and that the funds belonged to McKinney after they were transferred to her. Pet. App. 25a-27a. The district court, however, made no specific finding that the funds did not belong to Billman before they were transferred to McKinney. To the contrary, the district court's ruling rested on the implicit finding that Billman was the source of the funds. And as the court of appeals noted, the evidence introduced at the hearing leaves "no doubt that Billman was the source of the funds sent to [petitioner] McKinney through his solicitor and through the Europlan transaction." *Id.* at 6a-7a.[9]

b. There is no merit in petitioners' contention, Pet. 17-19, that the decision below will have a substantial and detrimental impact on legitimate commercial transactions. In the first place, that contention incorrectly equates any transfer of untainted assets (as opposed to the forfeitable racketeering proceeds) by a RICO defendant to a third party with a legitimate business transaction. Under Section 1963(m), however, a RICO defendant's untainted substitute assets are subject to forfeiture when he attempts to avoid the forfeiture of racketeering proceeds by removing or concealing them. That provision was designed to address "one

[9] Indeed, as the court of appeals noted, the evidence at the hearing justified the inference that the funds transferred to McKinney were actually part of the racketeering proceeds that had been deposited in Swiss banks. Pet. App. 7a.

of the most serious impediments to significant criminal forfeitures." S. Rep. No. 225, *supra*, at 201.[10] When a RICO defendant transfers forfeitable assets to a third party, Section 1963(c) protects the transferee if he can establish that he was "a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture under this section." The legitimacy of a third-party transaction therefore turns on whether the transferee had reason to believe that the transferred assets were forfeitable, rather than on whether the particular assets were tainted. Petitioner's claim thus vastly overstates the impact that the decision below will have on commercial transactions involving innocent third parties.

In any event, to the extent that the pretrial restraint of a RICO defendant's substitute assets may in some cases disrupt legitimate business transactions, that is not the case here.[11] Petitioner McKinney was not an innocent third party engaged in a legitimate business transaction with Billman. On the contrary, the indictment specifically charged that McKinney aided Billman in concealing the forfeitable racketeering proceeds in Swiss banks. And as the court of appeals noted, McKinney "presented insufficient evidence to show that she qualifies as a bona fide purchaser for value without cause to believe that the substitute assets in her hands [transferred by Billman] were subject to forfeiture."

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[10] The Senate Report noted that the provision "should be particularly helpful in combatting the problem of use of offshore banks as safe havens for crime-related assets." S. Rep. No. 225, *supra*, at 201 n.31.

[11] The Department of Justice recently adopted internal guidelines limiting the use of pretrial restraints in order to minimize their impact on innocent third parties and a defendant's legitimate business activities. See United States Attorneys' Manual § 9-110.414 (blue sheet issued June 30, 1989).

Pet. App. 8a. Accordingly, petitioner's claim does not warrant further review.

c. There is also no merit in petitioners' contention, Pet. 19-22, that the decision below conflicts with *United States* v. *Regan*, 858 F.2d 115 (2d Cir. 1988). In *Regan*, the Second Circuit upheld a pretrial restraint on the business operations of a third-party partnership of which five of the six RICO defendants were partners. Contrary to petitioner's contention, Pet. 21, the Second Circuit did not rule that restraining orders may be used only to preserve racketeering proceeds for their ultimate forfeiture. On the contrary, *Regan* squarely held that Section 1963(d)(1)(A) authorized the district court to impose pretrial restraints on all of the assets of the third party partnership—and not just the forfeitable partnership interests of the defendants—in order to prevent dissipation of the defendants' partnership interests. 858 F.2d at 119-121. The court remanded the case, however, for a determination whether other, less burdensome restraints were available to serve the government's interest in preserving assets equivalent to the value of the defendants' partnership interests for forfeiture. *Id.* at 121-122. Significantly, the court in *Regan* concluded that the district court could, as an alternative, restrain substitute assets of the individual defendants under Section 1963(m)(5) equal in value to that of the defendants' partnership interests. 858 F.2d at 121.[12] That conclusion is consistent with the Fourth Circuit's ruling here that forfeitable substitute assets of a RICO defendant are subject to pretrial restraint under 18 U.S.C. 1963(d)(1)(A). The Second Circuit in *Regan*, however, did not address the issue whether such forfeitable

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[12] The substitute asset provision was Section 1963(n) when the Second Circuit decided *Regan*. It was subsequently redesignated as subsection (m). See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7034(b), 102 Stat. 4398.

substitute assets that have been transferred to a third party are subject to pretrial restraint. Accordingly, there is no conflict between *Regan* and the court of appeals' decision in this case.[13]

2. Petitioner McKinney contends that the pretrial restraint of the transferred funds violates her Sixth Amendment right to counsel by depriving her of funds to retain counsel of her choice. That claim lacks merit.

In *Caplin & Drysdal, Chartered* v. *United States*, 491 U.S. 617 (1989), and *United States* v. *Monsanto*, *supra*, this Court held that the pretrial restraint of a defendant's forfeitable assets does not violate the Sixth Amendment, even if the restraint deprives her of funds to hire the attorney of her choice. In *Caplin & Drysdale*, the Court explained that "[t]he [Sixth] Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by courts." 491 U.S. at 624. The Court went on to note that "[t]he forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing." *Id.* at 625. In *Monsanto*, the Court concluded that "assets in a defendant's possession [that he plans to use to retain an attorney] may be restrained [pending trial] • • • based on a finding of probable cause to believe that the assets are forfeitable." 491 U.S. at 615 (footnote omitted).

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[13] As petitioner notes, Pet. 19 n.14, the court of appeals indicated that its decision was inconsistent with the district court's decision in *United States* v. *Chinn*, 687 F. Supp. 125 (S.D.N.Y. 1988). The reasoning of the *Chinn* decision, however, has not been adopted by any court of appeals. Consequently, any conflict between that decision and the one here does not warrant further review. None of the other cases cited by petitioner, Pet. 19-20, addressed the issue in this case.

Contrary to petitioner's contention, this Court's decisions in *Caplin & Drysdale* and *Monsanto* are controlling here. The grand jury's indictment established probable cause to believe that Billman derived forfeitable racketeering proceeds from the RICO offense. Cf. *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975).[14] The indictment likewise established probable cause to believe that Billman and petitioner McKinney have placed those forfeitable proceeds beyond the jurisdiction of the district court by depositing them in Swiss banks. The proof at the evidentiary hearing established that Billman is the source of the restrained funds transferred to McKinney. Thus, as the court of appeals explained, "[t]he funds in issue are not nonforfeitable assets" of petitioner McKinney because "[t]hey are Billman's substitute assets, which § 1963(m) subjects to forfeiture." Pet. App. 11a-12a. Accordingly, the pretrial restraint of those funds does not deprive petitioner McKinney of her Sixth Amendment right to counsel.

There is no merit to petitioners' claim that the decision below conflicts with the Eleventh Circuit's decision in *United States* v. *Bissell*, 866 F.2d 1343, cert. denied, 493 U.S. 849 (1989). Petitioners have submerged in ellipses a critical phrase from the quotation they cite from *Bissell*. What the Eleventh Circuit actually wrote in *Bissell* was "[i]f the defendant proves at trial or in a collateral proceeding that prosecutors, *acting in bad faith*, restrained assets which they knew or should have known to have no connection with criminal activity, a conviction would be in jeopardy due to a denial of the Sixth Amendment right to counsel of their choice." 866 F.2d at 1355 (emphasis added). Indeed, the

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[14] The Senate Report on the pretrial restraint provision noted that "probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order." S. Rep. No. 225, *supra*, at 202.

entire relevant section of *Bissell* discusses the potential for prosecutorial abuse. See *id.* at 1354-1355. *Bissell* did not address the issue in this case; it did not hold that a pretrial restraint like this one violates the Sixth Amendment; the money at issue in this case is forfeitable; and petitioners do not allege that the government is acting in bad faith. *Bissell* is inapposite.

3. Petitioners contend that the pretrial restraint of the transferred funds denies them due process. That claim, too, is meritless.

Petitioners' first due process claim is merely a variation of their Sixth Amendment claim. They argue that the court of appeals' decision raises serious constitutional questions because it permits the pretrial restraint of funds belonging to a third party without a finding of probable cause to believe that the funds are connected to criminal activity. Pet. 24. In *United States* v. *Monsanto*, this Court reaffirmed the principle that the government is permitted "to seize property based on a finding of probable cause to believe that the property will ultimately be proven forfeitable." 491 U.S. at 615. See also, *e.g.*, *United States* v. *$8,850*, 461 U.S. 555 (1983); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Here, as the court of appeals explained, "[t]he funds in issue * * * are Billman's substitute assets, which § 1963(m) subjects to forfeiture." Pet. App. 11a-12a. The pretrial restraint on the dissipation of those funds, therefore, does not violate the Due Process Clause.

Petitioners next argue that the pretrial restraint of the funds deprives them of due process by placing the funds beyond their control for an indefinite duration while Billman remains a fugitive. Pet. 24-25. In *United States* v. *$8,850*, 461 U.S. at 564-566, this Court held that the four factors set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972), provide the appropriate framework for determining whether a delay in forfeiture proceedings violates the due process right to

be heard at a meaningful time. Those factors are the length of the delay, the reason for the delay, the defendant's assertion of her right, and the prejudice to the defendant. Here, as the court of appeals explained, the "[d]elay resulting from Billman's flight cannot be attributed to the government," because "McKinney aided him by assisting in the transfer of Community's funds abroad." Pet. App. 13a. Based on the evidence at the hearing, the court also noted that "[McKinney] presently sustains [Billman] as a fugitive by forwarding messages left for him on an answering device." *Ibid.* Under these circumstances, the court correctly concluded that "[McKinney] is in no position to complain about the government's inability to bring [Billman] to trial." *Ibid.*[15]

Finally, petitioners claim that the pretrial restraint provision of the RICO forfeiture statute is unconstitutionally vague because it lacks a reasonably clear standard for third parties to determine whether and when assets in a transaction are subject to restraint. Pet. 25-26. Petitioners did not raise that claim in the court of appeals, however, see Br. for Appellee 1, 15-40, and they may not assert it in this Court for the first time. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, petitioners' attack on the facial validity of 18 U.S.C. 1963(d)(1)(A) must fail. Section 1963 does not infringe First Amendment freedoms, so petitioners' challenge must be evaluated in light of the particular facts of their case. The relevant issue is whether they had fair notice that they would be subject to that Act. *United States* v. *Powell*, 423 U.S. 87, 92 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). If they did, they cannot complain that the Act could be unconstitu-

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[15] The government is still attempting to catch Billman. See Washington Post, Apr. 27, 1991, at B1, col. 2.

tionally vague when applied to others. *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). Given the nature of the transactions at issue here, petitioners cannot make that showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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